Avante´ at Boca Raton, Inc., and Avante´ Terrace at Boca Raton, Inc., Joint Employers *and* 115 Nursing Home, Hospital & Service Employees Union—Florida affiliated with 1115 District Council, SEIU, AFL–CIO, CLC. Cases 12–CA–18860 and 12–CA–18893

June 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On October 8, 1998, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, cross-exceptions, and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified below.

The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the certified Union following the affiliation between its parent organization, 1115 District Council, and the Service Employees International Union (SEIU). The judge found that there was substantial continuity of representation following 1115 District Council's affiliation with the SEIU. In addition, he found that, while the bargaining unit employees did not receive minimal due process, since they did not receive any notice of the contemplated affiliation or attend the conventions at which affiliation was discussed, this did not justify the Respondent's refusal to bargain with the certified Union.

We agree with the judge, for the reasons stated in his decision, that there was substantial continuity of representation following the affiliation. We also agree, for the reasons set forth below, that the lack of notice to or participation by the unit employees in the affiliation process was not a basis justifying the Respondent's refusal to bargain with the Union.[1]

[1] We do not, however, agree with the judge that the unit employees were denied minimal due process. As discussed below, as nonmembers, the unit employees were not entitled to participate in the internal union affiliation process. We therefore grant the cross-exceptions filed by the General Counsel and the Charging Party Union on this issue, and disavow the judge's finding that the affiliation did not satisfy minimal standards of due process.

As the judge found, the Union maintained a policy that did not allow employees to become members until after their employer had entered into a collective-bargaining agreement with the Union. This precondition for membership had not occurred regarding the unit employees, and therefore they were not eligible to become members. Because nonmembers do not have a right to participate in internal union matters such as affiliation votes, the unit employees were not included in any respect in the affiliation process used by the District Council and the SEIU.

In *NLRB v. Financial Institution Employees,* 475 U.S. 192 (1986), the Supreme Court held that the Board exceeded its authority under the Act by requiring that nonmember employees be allowed to vote regarding an affiliation before it would order the employer to bargain with the affiliated union. The Board since has found, in circumstances similar to those here, that the general lack of participation by nonmembers in affiliation decisions does not justify an employer's refusal to bargain. See *Santa Barbara Humane Society*, 302 NLRB 833, 836 (1991); *Potters' Medical Center*, 289 NLRB 201, 202 (1988). Consistent with these decisions, we find that the Respondent violated Section 8(a)(5) of the Act as alleged.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Avante´ at Boca Raton, Inc., and Avante´ Terrace at Boca Raton, Inc., Joint Employers, Boca Raton, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraphs 2(e) and (f).

"(e) Within 14 days after service by the Region, post at its facilities in Boca Raton, Florida, copies of the attached notice marked 'Appendix B.' Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the no-

tice to all current employees and former employees employed by the Respondent at any time since May 8, 1997.

"(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Kevin J. Morris, Esq., for the General Counsel.
Clifford H. Nelson Jr., Esq. (Wimberly, Lawson, Steckler, Nelson & Schneider), of Atlanta, Georgia, for the Respondents.
Mark Richard, Esq., of Miami, Florida, and *Richard Greenspan, Esq.,* of Elmsford, New York, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on August 10 and 11, 1998, in Miami, Florida. After the parties rested, I heard oral argument, and on August 12, 1998, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach as "Appendix A," the portion of the transcript, pages 327 through 353, containing this decision.[1] The remedy, recommended Order, and notice provisions are set forth below.

CONCLUSIONS OF LAW

1. Avanté at Boca Raton, Incorporated, and Avanté Terrace at Boca Raton, Incorporated are joint employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 1115 Florida East, SEIU, AFL–CIO, CLC, a Division of District 1115, SEIU, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondents constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time certified nursing assistants, restorative aides, activities assistants, dietary aides, cooks, dietary porters, maintenance assistants, receptionist and central supply clerk employed by Respondents at their facilities located at 1130 N.W. 15th Street, Boca Raton, Florida 33486; excluding all other employees, including registered nurses (RNs), licensed practical nurses (LPNs), managers, confidential employees, office clerical employees, guards and supervisors as defined in the Act.

4. At all times since April 25, 1997, the Union has been, and is now, the exclusive bargaining representative of all employees in the unit described above in paragraph 3, for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since on or about May 8, 1997, the Respondents have failed and refused to recognize and bargain the Union as the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 above, and have violated, and continue to violate, Section 8(a)(5) and (1) of the Act.

6. Since on or about May 8, 1997, the Respondents have failed and refused to provide the Union with information, requested by the Union, which is relevant to and necessary to the performance of the Union's duty to represent the employees in the unit described in paragraph 3 above. The Respondents have violated, and continue to violate, Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached as appendix B.

Specifically, Respondents must cease and desist from their refusal to recognize the Union as the exclusive representative of its employees in the bargaining unit described herein. It must also recognize the Union as such representative, must provide the Union with the information which the Union requested, and must otherwise bargain with the Union in good faith, as provided in the National Labor Relations Act.

Respondents refused to recognize and bargaining with the Union very shortly after the Board certified the Union as the exclusive collective-bargaining representative. The Respondents have not, at any time, recognized or bargained with the Union. This refusal not only has precluded bargaining, but also has prevented the Union from representing the employees in other respects. Considering the impact of this refusal on the bargaining process, I conclude that the remedy must ensure that the Union has at least 1 year of good-faith bargaining in which its status as exclusive bargaining representative cannot be questioned. *Mar-Jac Poultry*, 136 NLRB 785 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996).

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondents, Avanté at Boca Raton, Incorporated, and Avanté Terrace at Boca Raton, Incorporated, Joint Employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union, Local 1115 Florida East, SEIU, AFL–CIO, CLC, a division of District 1115, SEIU, AFL–CIO, CLC, as the exclusive representative of its employees in the following unit appropriate for collective bargaining:

[1] I order the transcript corrected in accordance with appendix C (omitted from publication) to this decision.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time certified nursing assistants, restorative aides, activities assistants, dietary aides, cooks, dietary porters, maintenance assistants, receptionist and central supply clerk employed by Respondents at their facilities located at 1130 N.W. 15th Street, Boca Raton, Florida 33486; excluding all other employees, including registered nurses (RNs), licensed practical nurses (LPNs), managers, confidential employees, office clerical employees, guards and supervisors as defined in the Act.[3]

(b) Failing and refusing to provide information requested by the Union which is necessary for and relevant to the Union's performance of its duty as the exclusive representative of the employees in the unit described above.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union as the exclusive representative of the employees in the unit described above.

(b) On request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with Local 1115 Florida East, SEIU, AFL–CIO, CLC, a Division of District 1115, SEIU, AFL–CIO, CLC as the designated representative of the employees in the appropriate unit, as if the initial year of certification has been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order in this case and, if an understanding is reached, embody it in a written, signed agreement.

(c) Provide the Union with the following information, which the Union requested on about May 8 and June 2, 1997, for employees in the bargaining unit described above: Names, addresses, telephone numbers, marital or dependent status, job title, date of hire, and wage history, and shift and status of employees; the average bargaining unit wage by classification; the starting rate for all classifications; the pay scales and amount of raises uniformly granted; job descriptions; recent job postings; the policy on transfer of position, shift, or unit; a sample of recent work schedules; copies and descriptions of employee benefits programs including the cost to Respondents and to employees; the date health insurance will be renegotiated with the insurance carrier and any proposed changes; the number of employees with health plan coverage and the number enrolled for dependent coverage; a summary, actuarial review, number of retirees, and most recent Form 550 or 5550(c) for the pension plan; copies of the personnel handbook and any other written work rules or policies; orientation agenda; in-service training plans and sample materials; and tuition reimbursement plans.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Boca Raton, Florida, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

327

APPENDIX A

PROCEEDINGS

(Time Noted: 10:56 a.m.)

JUDGE LOCKE: On the record.

The hearing will be in order.

This is a Bench decision in the case of Avante at Boca Raton, Incorporated and Avante Terrace at Boca Raton, Incorporated, Joint Employers, which I will call the Respondents, and 1115 Nursing Home, Hospital and Service Employees Union—Florida, affiliated with 1115 District Council, SEIU, AFL–CIO, CLC, which I will call the Charging Party or the Union.

I conducted the formal hearing in this case on August 10 and 11, 1998, in Miami, Florida, at the same location I am issuing this Bench decision on August 12, 1998, pursuant to Section 102.35 Sub-paragraph 10 and Section 102.45 of the Board's rules and regulations.

I will begin with an overview of the facts.

On January 17, 1997, the Board conducted an election at the Respondent's facilities in a unit consisting of all full-time and regular part-time certified nursing assistants, restorative aides, activities assistants, dietary aides, cooks, dietary porters, maintenance assistants, receptionists, and central supply clerk with certain specified exclusions.

A majority of employees in this unit voted for a Union named 1115 Nursing Home Hospital & Service Employees Union—

328

Florida, which I will refer to as Local 1115—Florida.

At that time, this Union was one of about six affiliated with the District Council, identified as 1115 District Council. In March 1997, the District Council affiliated with the Service Employees International Union, AFL–CIO, CLC or SEIU.

[3] See *Avanté at Boca Raton, Inc.*, 323 NLRB 555 (1997).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

On April 25th, 1997, after considering the Respondent's objections, the Board certified Local 1115—Florida as the exclusive bargaining representative of the bargaining unit employees.

Beginning on May 8th, 1997, the Union demanded that the Respondents recognize and bargain with it, and requested certain information to use in connection with that bargaining.

The Respondents refused, contending that the District Council's affiliation with the SEIU caused a break in the continuing of the bargaining representative.

I find that the Respondent's refusal to recognize and bargain with the Union, and the Respondent's refusal to provide the information requested by the Union, violates Sections 8(a)(5) and (1) of the National Labor Relations Act.

Before discussing the disputed allegations in this case, I will begin with the Complaint allegations which the Respondents admit.

The Complaint alleges, the Respondent admits, and I find, that the charge in Case 12–CA–18860 was filed by the Union on June 23rd, 1997, and that a copy of it was served by first class

329

mail on the Respondent, on June 25th, 1997.

The Regional Director for Region 12 for the National Labor Relations Board issued Complaint and Notice of Hearing based upon this charge on July 29, 1997.

Respondent further admits, and I find, that the charge in Case 12–CA–18893 was filed by the Union on July 9, 1997, and that a copy was served on Respondent on July 10, 1997.

The Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing on February 26th, 1998, which includes both Case 12–CA–18860 and 12–CA–18893.

I will refer to this pleading as the consolidated Complaint or simply as the Complaint.

Respondent filed a timely answer to the consolidated Complaint and admitted a number of its allegations. Based upon these admissions, I make the following findings.

At all material times, Respondents have been Florida corporations with an office and place of business in Boca Raton, Florida, and have been engaged in the business of operating a nursing home and an assisted living facility.

During the twelve months preceding issuance of the consolidated Complaint, the Respondents, in conducting their business operations described in the Complaint, derived gross revenues in excess of $100,000.

Additionally, during the twelve months preceding issuance

330

of the consolidated Complaint, the Respondents, in conducting their business operations, purchased and received at their Boca Raton facility, goods and materials valued in excess of $10,000 directly from points located outside the State of Florida.

Respondents admit and I find that at all times material to the Complaint, they have been Employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Paragraph 4 of the consolidated Complaint alleges that at all times material, Louis Manzo occupied the position of Respondents' administrator, is now, and has been at all times material to the Complaint, a supervisor of the Respondents within the meaning of Section 2(11) of the Act, and an agent of Respondents within the meaning of Section 2(13) of the Act.

The Respondents admit that Louis Manzo was the Administrator of its facilities located at 1139 N.W. 15th Street, Boca Raton, Florida, and exercised supervisory authority under Section 2(11) of the Act until on or about February 9, 1998, but Respondents state further that Mr. Manzo is no longer Administrator of those facilities.

I find that Louis Manzo was the Administrator of Respondents' facilities during the time period admitted by them, and that during this time period, he was a supervisor of the Respondents within the meaning of Section 2(11) of the Act, and their agent within the meaning of Section 2(13) of the Act.

331

Although Respondents have denied the Complaint paragraphs which allege that the Union is the exclusive collective bargaining representative of a unit of the Respondents' employees, I mention these allegations at this time because they provide necessary context for other allegations which Respondents have admitted.

Specifically, Paragraph 5b of the Complaint alleges that on April 25, 1997, the Union was certified as the exclusive collective bargaining representative of a unit of Respondents' employees described in Complaint Paragraph 5a.

Paragraph 5c alleges that at all times since April 25th, 1997, the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive bargaining representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Notwithstanding the Respondents' denials, I take official notice of the certification issued by the Board in Case 12–RC–8034, reported at 323 NLRB Number 93.

That certification described the same collective bargaining unit alleged to be appropriate in Paragraph 5 of the Complaint.

It establishes that on January 17, 1997, the Board conducted an election by secret ballot at the Respondent's facilities, and that a majority of employees in that bargaining

332

unit cast ballots in favor of representation by a Union designated "1115 Nursing Home, Hospital & Service Employees Union—Florida, affiliated with 1115 District Council."

Based upon the Board's action in Case 12–RC–8034, I find that the General Counsel has proven all allegations raised in Paragraphs 5a, 5b and 5c of the consolidated Complaint.

Although the Respondents' answer denied the allegations in Paragraph 5 of the Complaint, and although the Respondents deny having any duty to bargain with the Union described in the Complaint, they do admit that the Union has requested bargaining, as alleged in Paragraph 6 of the Complaint.

Specifically, Paragraph 6a of the Complaint alleges that on or about May 8th, 1997 and June 2nd 1997, the Union, by letters, requested to meet and bargain with the Respondents.

The Respondent admits that by letters on these dates, the Union did request that the Respondents meet and bargain collec-

tively. And in accordance with the admission of the Respondents and the record as a whole, I so find.

Paragraph 6b alleges that since on or about May 8th, 1997, the Respondents have failed and refused to meet and bargain with the Union as the exclusive collective bargaining representative of employees in the collective bargaining unit.

In their Answer, the Respondents admit that since on or about May 8th, 1997, they have refused to bargain—to recognize and bargain with the Union as the exclusive bargaining

333

representative of the unit.

Their Answer further states that this refusal to recognize and bargain is, quoting the Answer verbatim:

"In part due to the objectionable conduct surrounding the election, and the impropriety of the certification issued by the Regional Director in Case Number 12-RC-8034, as well as the fact that the entity requesting that bargaining occur was not a continuing representative organization, and proper successor to the entities certified. The Respondents' have no duty to bargain with this new entity."

However, I note that the consolidated cases before me do not call upon me to decide any issues concerning the alleged conduct surrounding the election or the propriety of the certification issued in Case 12–RC–8034.

The Board already has resolved such issues which are not before me. The facts established by the Board in Case 12-RC-8034, and reported at 323 NLRB Number 93, are not open to question here.

In other words, I accept as beyond dispute that the unit which the Board certified on April 25, 1997 in Case 12–RC–8034 is an appropriate unit for collective bargaining and that a labor organization named 1115 Nursing Home, Hospital & Service Employees Union—Florida, affiliated with 1115 District Council, SEIU, AFL–CIO, CLC was, at the time of the certification, the certified exclusive representative of the

334

employees in the unit.

The questions which I must resolve concern, in part, whether the labor organization now demanding recognition and bargaining is the same labor organization certified by the Board in Case 12–RC–8034 or whether changes in name and affiliation have changed it in such a manner that the Respondents do not have a bargaining obligation to the entity which now demands bargaining.

The three sub-paragraphs of Complaint Paragraph 7 allege that on or about May 8th, 1997 and June 2nd, 1997, the Union requested certain specified information about employees in the bargaining unit, that this information was necessary for and relevant to the Union's performance of its duty as the exclusive collective bargaining representative and that since on or about May 8th, 1997, the Respondents have failed and refused to furnish the Union with the information requested.

In their Answer, the Respondents admit that the Union made the information request alleged in Complaint Paragraph 7a. I so find.

The Respondents also admit that since on or about May 8th, 1997, they have refused to furnish the Union with the information requested. I so find.

The Respondents' Answer does not specifically address the allegation that the requested information is relevant to collective bargaining and necessary for the Union to engage in

335

such bargaining. However, the Respondents deny having any duty or obligation to provide the information.

Because the Respondents have admitted that the Union made the information request described in Complaint Paragraph 7a, the determination of whether the information sought is relevant to and necessary for collective bargaining, involves only a legal conclusion.

The Union requested information about employees in the bargaining unit, specifically their names, addresses, telephone numbers, marital or dependent status, job titles, basic hire and wage history, and shift and status of employees.

The Union also requested the average bargaining unit wage by classification, the starting rate for all classifications, the pay scales, and amounts of raises uniformly granted, job descriptions, recent job postings.

The Respondents' policy on transfer of position, shift or unit, a sample of recent work schedules, copies and descriptions of employee benefit programs, including the cost to Respondents and to the employees, the date health insurance will be renegotiated with the insurance carrier, and any proposed changes, the number of employees with health plan coverage, and the number enrolled for dependent coverage, a summary actuarial review, number of retirees, and most recent Form 550 or 5550C for the pension plan.

336

Copies of the personnel handbook, and any other written rules or policies, orientation agenda, in-service training plans and sample materials, and tuition reimbursement plans.

I find that the information sought concerns the wages, hours and working conditions of bargaining unit employees and pertains to mandatory subjects of collective bargaining.

Such information is relevant and necessary to the Union in fulfilling its collective bargaining responsibilities. If the Respondent had a duty to bargain with the Union, then it clearly had a duty to provide the requested information.

Therefore, whether or not Respondents' refusal to provide this information constituted an unfair labor practice, will depend on the resolution of the more general issue of whether Respondent had a duty to recognize and bargain with the Union.

Other allegations raised in the Complaint are in dispute. Paragraph 3a alleges that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The Respondent admits that 1115 Nursing Home, Hospital & Service Employees of Florida, affiliated with 1115 District Council is a labor organization within the meaning of the Act, but the Respondents' answer then avers that they:

"Have no knowledge of whether that organization, as affiliated with SEIU, is a labor organization. Further, Respondents deny that SEIU is a party to the certification

337

issued by the Regional Director in Case Number 12–RC–8034."

With respect to the last sentence, Paragraph 3 of the Complaint does not allege that the SEIU is a party to the certification in Case 12–RC–8034, so that matter is not in issue.

Rather, the issue presented by Complaint Paragraph 3a concerns whether the Union is a labor organization and has remained a labor organization after the affiliation.

The allegation can be resolved without reaching the core issue of the case, whether or not the entity which sent the Respondents the May 8, 1997 and June 2, 1997 letters demanding recognition and bargaining was the same entity certified by the Board in Case 12–RC–8034.

The evidence clearly establishes that it is a labor organization. Thus, uncontradicted testimony establishes that it is an organization in which employees participate, and which exists in whole or in part, for the purpose of dealing with Employers concerning grievances, labor disputes, grievances, rates of pay, hours of employment and conditions of work.

I find that it is a labor organization within the meaning of Section 2(5) of the Act.

As originally pleaded in the consolidated Complaint, Paragraph 3b alleges that on or about April 1, 1997, the Union's parent organization, 1115 District Council, became affiliated with Service Employees International Union, AFL–CIO, CLC, and

338

that its correct name became 1115 Nursing Home, Hospital & Service Employees Union—Florida, affiliated with 1115 District Council, SEIU, AFL–CIO, CLC.

The Respondents' Answer states that they are without knowledge regarding this purported affiliation and, therefore, they denied the allegation.

By written motion submitted at the beginning of hearing as General Counsel's Exhibit 2, the Government sought to delete Paragraph 3b as it appeared in the consolidated Complaint, and substitute a new Paragraph 3b.

The General Counsel also added new Sub-paragraphs 3c and 3d. I granted the Government's motion and allowed the amendment, and will consider these allegations to be denied by the Respondent.

As amended, Paragraph 3b alleges as follows. "On or about April 1, 1997, 1115 District Council, the parent organization of the Union, until then known as 1115 Nursing Home, Hospital & Service Employees Union—Florida, affiliated with Service Employees International Union, SEIU, AFL–CIO, CLC, and the name of the Union became 1115 Nursing Home, Hospital & Service Employees Union—Florida, affiliated with 1115 District Council, SEIU, AFL–CIO, CLC."

The new Paragraph 3c alleges as follows: "On or about July 9, 1997, the Union changed its name to Local 1115—Florida, SEIU, AFL–CIO, CLC, a division of District 1115, SEIU,

339

AFL–CIO, CLC."

The new Paragraph 3d alleges as follows: "On or about September 15, 1997, the Union changed its name to Local 1115—Florida East, SEIU, AFL–CIO, CLC, a division of District 1115, SEIU, AFL–CIO, CLC."

Uncontradicted evidence establishes the facts alleged in Complaint Paragraphs 3b as amended, 3c, and 3d. I find that the Government has proven these allegations.

The Government's amendments also changed the first sentence of the Complaint to reflect the new name of the Charging Party.

Uncontradicted evidence establishes that the local Union, which was designated 1115 Nursing Home Hospital & Service Employees Union—Florida, affiliated with 1115 District Council, SEIU, AFL–CIO, split into two local Unions in September 1997.

The larger one, Local 1115 Florida East, represents employees working at about 20 facilities on the East Coast of Florida. Its officers were previously officers of Local 1115 Florida, and no new officers were elected when the split took place.

The previous Local, Local 1115—Florida, also represented employees working at about seven facilities in Western Florida. Local 1115 Florida West came into existence at the same time as Local 1115 Florida East, and it assumed the function of

340

representing these employees in West Florida.

Since the Florida West Local was essentially a new body, it had no officers and Union members elected officers. The Secretary-Treasurer of Local 1115—Florida East, Mr. Grossberg Miranda, testified without contradiction, that the split produced no change in officers, representatives, duties, by-laws, or manner of functioning for Local 1115—Florida East.

Similarly, it did not change the authority of the officers in Local 1115—Florida East, to perform the duties of their offices. Crediting this uncontradicted testimony, I find that to be the case.

I conclude that the creation of the new Florida West Local from a small portion of the Florida local, did not change the way the remainder of that Local functioned in any significant way.

A possible analogy may be found in the biblical account of the creation of Eve from Adam's rib. Presumably, this procedure had no significant effect on Adam's identity. Even with one rib less, he was still Adam, although it did change the rib.

Here I am concerned only with the status of Adam and I find that it remains the same as before.

Moreover, the Complaint alleges that the violations began on about May 8th, 1997, when the Respondents admittedly refused to recognize and bargain with the Union. That was before the split of Local 1115—Florida into two Locals, Florida East and

341

Florida West.

Therefore, that later split could not be relevant to either the Government's theory of the case, or the justification asserted by the Respondents.

Stated another way, if any significant change took place, which made the Union which demanded recognition on May 8th, 1997 significantly different from the Union which the Board had certified on April 25, 1997, that change did not concern the later split of Local 1115—Florida into two Locals.

At this point, embarking upon the discussion of possible changes in the continuity of the Union certified as the bargaining representative, it is important to examine the sequence of events carefully, and with attention to procedural principles.

The admitted refusal to bargain began on May 8th, 1997, less than three weeks after the Board certified the Union on April 25th, 1997.

During the first year after Board certification, a labor organization enjoys an irrebuttable presumption that it continues to have the support of a majority of the employees in the unit it represents.

In other words, it does not fall within my authority to question the Union's majority status on May 8th, 1997, or even to consider it questionable. The Union conclusively was the collective bargaining representative.

342

However, I do have authority to consider the Respondents' arguments to the extent that the arguments assert that the Union which demanded to bargain on May 8th, 1997, was not the same entity which was certified on April 25, 1997.

There appears to be a subtle gray area regarding the extent to which the Board's April 25, 1997 certification in Case 12–RC–8034 limits my authority to consider events which took place between the date of the election on January 17, 1997, and April 15th.

During that time period, the District 1115 voted to become affiliated with the Service Employees International Union. The Respondents based much of their defense on the asserted effects of this affiliation, which appears to have taken place sometime after the deadline for filing objections to the conduct of the election.

I will proceed under the assumption that if the affiliation changed the identify of the Union so greatly that there was a substantial difference between the Union selected by the employees on January 17th and the one which demanded recognition on May 8th, 1997, that difference may be considered by me and by the Board. However, in view of the conclusive presumption that a Union continues to enjoy majority support during its first year of certification, it does not matter whether or not the affiliation with the SEIU made employees disaffected.

343

I conclusively conclude that a majority still supports the Union, which the employees chose on January 17, 1997.

The only change which could affect the Respondents' bargaining obligation would be a change that altered the identify of the Union.

In other words, the change would have to be so profound that it made the Union which demanded bargaining a different entity from the one which had received the Board certification three weeks earlier, and with that certification, the conclusive presumption of majority status for one year.

Law professors might imagine situations which made that possible, and so could science fiction writers. However, I lack that kind of imagination.

Apart from the possibility of extra-terrestrials cleverly disguised as business agents, I have some difficulty visualizing events causing a change in Union identity so great that it would deprive the Union of its certification year presumption.

In determining whether a Union affiliation or merger causes a change sufficient to vitiate an Employer's bargaining obligation, the Board typically focuses on two areas.

One concerns whether there is substantial continuity of representation both before and after the change. The Board evaluates whether there has been a change in Union leadership. Additionally, it looks at whether there's been a change in the amount of power that the Union leaders possess and exercise.

344

Similarly, the Board considers changes in financial arrangements which, of course, may reflect changes in control of the Union.

The Board examines whether the Union's assets have been transferred to some other entity and what changes, if any, have been made in dues paid by the membership.

It also evaluates whether the authority to set policy and priorities in collective bargaining remains with the same Union leaders who possessed it before.

Similarly, a shift in who has power to call a strike, and who possesses authority to settle grievances will be considered.

The evidence in this case is uncontradicted. It establishes that by all of these measures, the Union's affiliation with the Service Employees International Union did not disturb or alter the distribution of power, authority and assets.

It also did not alter the day-to-day functioning of the Union and its representation of employees. However, the record does disclose some things that were altered.

For example, the affiliation results in the District Council paying a per capita tax to the SEIU. That tax is being phased in over a four-year period, and if the rate is unchanged, will amount to about $6 per member per month.

The evidence indicates that before the affiliation, the Union did not pay any per capita taxes for members in Florida.

345

Additionally, the affiliation agreement imposes on the District Council an obligation to spend a certain amount on organizing activities. Union President Sackman described this obligation as being in perpetuity. However, while recognizing that such an obligation limits the freedom and discretion of Union officials to spend that money elsewhere and for other purposes, I find that it is not sufficient to create a substantial break in the continuity of representative.

The evidence does not establish that this arrangeme nt results in the unit employees having fewer resources that can be committed to their representational needs than were available for the affiliation.

See *CPS Chemical Company, Inc.,* 324 NLRB Number 154, [1018] decided November 7, 1997.

In other respects and particularly from the viewpoint of the employees, the affiliation caused little, if any change. In par-

ticular, there is no showing that the affiliation fundamentally altered the conduct of the day-to-day affairs of the Local Union organization.

See *Miller Waste Mills, Inc., doing business as RTP Company*, 323 NLRB Number 4, [15] February 20, 1997.

The Board has held that an affiliation of a Local Union with an International Union does not, by itself, interrupt the continuity of representation.

346

See, for example, *Minn-Dak Farmers Cooperative,* 311 NLRB 942, a 1993 case, in which the Board, noting that a certified Union enjoys a presumption of continuing majority support, stated that:

"The Union's subsequent affiliation with a national or international organization does not, standing alone, affect the Union's representative status or terminate the Employer's duty to bargain with the Union." 311 NLRB 944.

See also *Texas Plastics, Inc.,* 263 NLRB 394. a 1982 case.

The Respondent bears the burden of proving that the affiliation has produced a break in the continuity of representation. The evidence does not establish that to be the case here.

Apart from the question of continuity, the Board also examines whether the Union's internal affiliation process satisfies at least minimal standards of due process.

Some cases refer to this inquiry as the second prong of a two-prong test, the first prong concerning the issue of substantial continuity.

However, I believe the expression "two-prong" test may be misleading, in that it may suggest that both prongs of the test must be satisfied or that both are of equal moment. That is not the case.

During oral argument, counsel for the General Counsel suggested that if there is no change in the identity of the

347

Union, then it is not appropriate to consider the due process matter.

In other words, the issue of due process becomes important only when affiliation results in a significant change.

My review of the cases, including those cited by all sides during oral argument, leads me to believe that the law is not settled on whether or not the Board may apply due process standards to an affiliation vote, which is largely an internal Union matter.

In the recent *Sullivan Brothers Printers,* 317 NLRB 561, a 1995 case, the Board stated in a footnote, "In light of our findings here that the Board's due process requirements have been met in this case, we find it unnecessary to determine whether, in view of the Supreme Court's opinion in Seattle First, the Board lacks the authority to impose due process requirements."

See 317 NLRB at Page 62, Footnote 2.

In the same volume, the Board stated in *Paragon Paint Corp.,* 317 NLRB 747 at 748, also a 1995 case, "Finally, we note that the Judge found the merger election satisfied the Board's traditional due process criteria. Accordingly, we need not pass on what action the Board would take had the election not satisfied these standards."

In the instant case, I believe the issue cannot be avoided. The bargaining unit employees did not receive any

348

minimal due process.

I find that the Union has a policy which denies the unit employees eligibility to become members until their Employer enters into a collective bargaining agreement with the Union. As the Respondent admits, the Respondents have refused to recognize the Union.

The bargaining unit employees did not receive any notice regarding the contemplated affiliation, and did not attend any of the conventions at which Union members discussed these issues.

Under the Board's precedents, it does not matter that the Union members approve the affiliation proposal by a voice vote, rather than by secret ballot. Indeed, for due process purposes, it may not even be necessary for the members to have any vote on the affiliation question at all.

See, for example, House of the *Good Samaritan,* 247 NLRB 539, a 1980 case, and *Aurelia Osborn Fox Memorial Hospital,* 247 NLRB Number 43, [356] also a 1980 case.

The Board considers more important the fundamental due process principle that a person receive notice of the proposed action, and the right to be heard about it.

Thus, in *Miller Waste Mills, Inc. d/b/a RTP Company,* 323 NLRB Number 4, [15 (1997)] the Board listed among its due process standards that notice of the election be given to all members, that members have adequate opportunity to discuss the

349

election, and that reasonable precautions to maintain ballot secrecy be taken.

With respect to this last requirement, from other Board cases it is clear that a Union does not have to conduct a secret ballot election in the rigorous Board manner to satisfy the due process requirements.

If I were to reach the issue of due process, I would conclude that the Union failed to meet even minimal standards of due process with respect to the bargaining unit members. It is true that non members of the Union do not have a right to participate in internal Union matters such as affiliation votes.

At the same time, in this case it must be noted that the Union did not give the bargaining unit employees the right to join the Union. Thus, they were all on the outside, not because they choose to be, but in some cases at least, because they had no choice. The unwritten policy excluded them.

Moreover, I believe that the right to notice and the right to be heard exists even when the right to vote does not exist. Being heard means more than being able to attend the particular Union meeting or convention.

A person can communicate his or her views in a number of ways, ranging from a postcard to E mail, but unless the person receives notice of a proposed action, he or she does not have the opportunity to be heard about it.

Although I would conclude that bargaining unit employees

350

did not receive minimal due process, I do not believe that I may take that conclusion into account in evaluating this case, or in reaching a decision herein.

The Supreme Court's decision in *NLRB versus Food and Commercial Workers Local 1182,* 472 US 192 (1986), commonly referred to as *Seattle First National Bank or Sea First,* does not decide whether or not the Board totally lacks authority to impose standards on internal Union matters.

However, this same case does markedly limit the power of the Board to impose such due process standards in a case such as this one arising in the representation context.

Writing for a unanimous Court, Justice Brennan stated in part, as follows. Again, I quote:

"Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation.

"In any event, dissatisfaction with representation is not a reason for requiring the Union to allow nonunion employees to vote on union matters like affiliation. Rather, the act allows Union members to control the shape and direction of their organization, and `non Union employees have no vote in affairs of the Union.'"

Citing *Allis-Chalmers,* 388 US at 191.

Justice Brennan continues, stating, "We repeat,

351

dissatisfaction with the decisions union members make, may be tested by a Board-conducted representation election only if it is unclear whether the reorganized Union retains majority support."

475 US at Pages 205 and 206.

The last quoted sentence, the one beginning with the phrase, "We repeat," speaks with a definite tone of voice, even from a printed page. The Court did not want to leave any doubt about this principle.

In fact, Justice Brennan's opinion goes on to phrase the principle in a somewhat different, but all the same emphatic way a little later.

Again, I quote from the decision. "If the Board finds that affiliation raises a question of representation undermining the Board's own election and certification procedures, *Amoco Production Company,* 262 NLRB, at 1241, it can refuse to consider the Union's unfair labor practice charge, and is authorized to conduction a representation election.

"However, it may not condone an Employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the Union to follow in order to invoke the Act's protection."

475 US at 207, 208.

The present case arose during the Union's certification year, during which it enjoyed a conclusive presumption of

352

majority status, at a time when a question concerning representation could not be raised and would not be considered by the Board.

I have found that the evidence does not establish any break in the continuity of the Union, even though the Union affiliated with an International, and even though the name of the Union was slightly changed.

In these circumstances, a question concerning representation cannot be raised. Therefore, in the absence of a question concerning representation, I may not take into account my conclusion that the bargaining unit employees did not receive any minimal standards of due process.

In sum, I find that when the Union requested recognition in bargaining, the Respondents had a duty to recognize and negotiate with it.

Similarly, when the Union requested information relevant and necessary to mandatory subjects of collective bargaining, the Respondents had a duty to provide that information.

By their own admission, Respondents did not recognize and bargain with the Union, and did not provide the requested information. I conclude that the Respondents thereby violated Section 8(a)(5) and (1) of the Act.

The remedy will include an order that the Respondents recognize and bargain with the Union, provide the requested information, and post a notice to employees.

353

Upon receipt of the transcript of this proceeding, I will issue a certification of Bench Decision. This certification of Bench Decision will include specific provisions regarding the remedy, order and notice, and will include as an attachment, the transcript pages reporting the decision I have just given.

In accordance with its rules, the Board will then serve copies of this certification upon the parties. The deadline for appeal will begin to run when the parties are served with the certification and decision.

I have been very impressed during this hearing with the professionalism of counsel, and with how well they cooperated to assure the hearing ran smoothly and efficiently.

It has been a please to work with all of you on this case.

The hearing is closed.

Off the record.

(Whereupon, at 11:40 a.m., the hearing in the above-entitled matter was closed.)

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything which interferes with these rights.

WE WILL NOT fail and refuse to recognize and bargain with the Union, Local 1115 Florida East, SEIU, AFL–CIO, CLC, a Division of District 1115, SEIU, AFL–CIO, CLC, as the exclusive representative of our employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants, restorative aides, activities assistants, dietary aides, cooks, dietary porters, maintenance assistants, receptionist and central supply clerk employed by the Employer at its facilities located at 1130 N.W. 15th Street, Boca Raton, Florida 33486; excluding all other employees, including registered nurses (RNs), licensed practical nurses (LPNs), managers, confidential employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to provide relevant information requested by the Union, which is necessary for it to represent our employees in the unit described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective–bargaining representative of the employees in the unit described above, bargain with the Union in good faith, and, on request, reduce any agreement reached to writing, in accordance with our obligations under Section 8(d) of the National Labor Relations Act.

WE WILL provide the Union with the information it requested on or about May 8 and June 2, 1997.

AVANTÉ AT BOCA RATON, INCORPORATED, AND AVANTÉ TERRACE AT BOCA RATON, INCORPORATED, JOINT EMPLOYERS